



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
DIRECTIVE**

**DIRECTIVE NUMBER
224
DISTRIBUTION DATE
August 8, 2007**

1. SUBJECT: COMPLAINTS ON UNLAWFUL PRE-EMPLOYMENT INQUIRIES

2. PURPOSE: To set forth the procedure for accepting complaints that allege unlawful pre-employment inquiries.

3. BACKGROUND: The Fair Employment and Housing Act (FEHA), section 12940, subdivision (d), prohibits any non-job-related inquiry, either verbal or through the use of an application form, which directly or indirectly limits a person's employment opportunities because of race, religious creed, color, national origin, cancer, genetic characteristics, ancestry, physical disability (including AIDS), mental disability, medical condition, marital status, sex (including pregnancy), age (over 40), sexual orientation, or because of family care leave or leave for an employee's own serious health condition. The Regulations of the Fair Employment and Housing Commission (FEHC), in the California Code of Regulations, Title 2, section 7287.3, subdivision (a)(2), state that, unless pursuant to a permissible defense, an employer or other covered entity shall not engage in any recruitment activity which 1) restricts, excludes, or classifies individuals on a basis enumerated in the Act; 2) expresses a preference for individuals on a basis enumerated in the Act; or 3) communicates or uses advertising methods to communicate the availability of employment benefits in a manner intended to discriminate on a basis enumerated in the Act.

The procedures described below apply only to **pre-employment inquiries**, i.e., information sought from an applicant *prior* to the offer of a job. Employers may make the offer of a position contingent on an individual providing certain information which, if requested during the "pre-employment" phase of the selection process would be unlawful. For instance, information regarding birth certificates, naturalization papers, medical histories, etc., may be requested after the employer has decided to hire the individual and so informs him/her, as long as it is job-related..

4. PROCEDURES:

A. Complainant Alleges Unlawful Pre-Employment Inquiries at Intake:

Where a complainant alleges that he/she was subjected to unlawful pre-employment inquiries (either written or verbal), the following procedures will be followed:

- 1) Complaints will be taken where a direct link can be made between the unlawful pre-employment inquiry and the non-selection for the position. The allegation(s) regarding the unlawful pre-employment inquiries will be included in the complaint.

EXAMPLE: The complainant, a 65-year-old female, alleges that the employer's application requested her age. During the hiring interview, the interviewer commented that the complainant "looked good for her age." The complainant was not selected for the position for which she was clearly qualified and a much younger person with less experience was selected.

- 2) Complaints *will not be taken* in those instances where complainants allege they were subjected to unlawful pre-employment inquiries, but are unable to link the unlawful inquiries to their non-selection.

EXAMPLE: The complainant, a 41-year-old female, alleges that she filled out an employment application that asked her age. The complainant states that during the interview a comment was made that she looked older than the age cited on the application. The complainant confirms that she was rejected for the position because she didn't have the required certifications. The complainant had no information to suggest that others without certification were selected.

- 3) Where a complaint for investigation is not taken, complainant will be offered the opportunity to file a "b" complaint ("complaint taken for filing purposes only").
- 4) In instances where neither a complaint for investigation nor a "b" complaint was taken, the information will be routed to the District Administrator. Complainants will be advised that no individual complaint for investigation will be taken, and informed that their concerns will be forwarded to the District Administrator for possible further action. The District Administrator will proceed as described in Section 4.B., below.

B. Unlawful Pre-Employment Inquiries Where There Is No Complainant:

When a written unlawful pre-employment inquiry is brought to the attention of the Department and there is no aggrieved party to file a formal complaint, such as an anonymous inquiry, or a decision was made not to take a complaint for investigation or filing, the following procedures will be followed:

- 1) The District Administrator will attempt to resolve the matter informally. A letter will be sent to the employer which states the particulars of the unlawful acts and requests voluntary compliance. If the employer complies with the request, no further action will be required.
- 2) Where the employer refuses to comply with the request, the case will be referred to the appropriate Regional Administrator. The Regional Administrator will attempt to achieve voluntary compliance through a letter to the employer. If the employer complies with the request of the Regional Administrator, no further action will be required.

C. Director's Complaints Arising From Unlawful Pre-Employment Inquiries:

- 1) Where an employer refuses to comply with the Department's request to voluntarily change its discriminatory practice(s), the Regional Administrator will decide whether to recommend a Director's Complaint.
- 2) Where a decision is made to recommend a Director's Complaint, the pre-complaint information will be returned to the District Administrator. The information will be processed in accordance with the procedures described in Directive 222, "Director's Complaints."
- 3) Where a decision is made not to proceed with a Director's Complaint, the Regional Administrator will advise the District Administrator in writing of the reasons for not proceeding.

5. APPROVAL:

Wanda J. Kirby, Acting Director

Date